Supreme Court, U.S.
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NO. 85-454

in the Supreme Court of the United States

OCTOBER TERM, 1985

SOL MUNOZ SIBAJA, et al.,
Petitioners,

vs.

THE DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

THE DOW CHEMICAL COMPANY'S BRIEF IN OPPOSITION

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26 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court below was correct in affirming the dismissal of this action on the grounds of *forum non conveniens* with respect to the specific and unique facts presented here.

LIST OF INTERESTED PARTIES

SAUL MUNOZ SIBAJA and RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR and SINAI TORRES ROSALES, VICENTE FLORES VALVERDE and MARIA MAYELA VEGA FIGUREROA, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ and MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ and MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS and ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA and YAMILETH NURIS VILLEGAS DIAS, SEGUNDA RODRIGUEZ RODRIGUEZ and MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO and EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ and MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI and MELITINA GONZALEZ, EDWIN GOMEZ CASTRILLO and ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA and PAULA CORTEZ GOMEZ, MEFTALI ARAYA GARITA and LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ and ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA and PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA and MARIA DE LA CRUZ GONZALEZ GONZALES, ISAIAS SANCHEZ RIVERA and FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ and MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS and MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL and ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA SOSSA and FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO and MARIA DE LOS ANGELES, GERARDO PERAZA GARRO and NELLY UMANA

ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI,

Represented by: Russell W. Budd, Esq.
Jane N. Saginaw, Esq.
Baron & Budd
Dallas, Texas

SHELL OIL COMPANY,

Represented by: Henry Burnett, Esq.
Thomas F. Martin, Esq.
Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.
Miami, Florida

Burt Ballanfant, Esq.
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Litigation Section
Houston, Texas

DOW CHEMICAL COMPANY,*

Represented by: Edward Corlett, III, Esq.
Michael B. Buckley, Esq.
Leanne Frank Pflaum, Esq.
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Miami, Florida

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*A list of DOW'S subsidiaries and affiliates as of September, 1985 is set out in the appendix.

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SOL MUNOZ SIBAJA, et al.,
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THE DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

The Respondent, The Dow Chemical Company, prays that the Petition for Certiorari be denied.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is published at 757 F.2d 1215 (11th Cir. 1985). It is

accurately reproduced in the Petitioners' appendix. Rehearing was denied by the Eleventh Circuit at 765 F.2d 154 (11th Cir. 1985). The opinion of Judge King in the Southern District of Florida is not published. It is, however, accurately reproduced in the Petitioners' appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

While the Rules of Decision Act, 28 U.S.C. §1652 (1982), as set forth in the Petition, is implicated in this case, it was not specifically argued below. Further, it was not specifically construed by the lower courts.

COUNTERSTATEMENT OF THE CASE

Appellants are fifty-eight (58) Costa Rican citizens. During the course of their employment in Costa Rica they claim injury when exposed to certain pesticides manufactured by The Dow Chemical Company (hereinafter Dow) and/or the Shell Oil Company (hereinafter Shell). Plaintiffs brought suit in the Eleventh Judicial Circuit Court in Dade County, Florida—a forum that has no connection with this litigation. Along with the complaint, Petitioners served in-depth interrogatories and requests for production pertaining to the merits of this case.

Respondents removed this case to the Southern District of Florida and moved to dismiss on the grounds of *forum non conveniens*. In support of these motions

Respondents served detailed affidavits containing facts pertinent to the "public and private interest factors" which are to be considered under the doctrine of *forum non conveniens. See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), *rev'g* 153 F.2d 883. 170 A.L.R. 319 (2d Cir. 1946). Petitioners responded to these motions to dismiss. The Southern District of Florida granted these motions and dismissed the case based upon the federal jurisprudence pertaining to the doctrine of *forum non conveniens.* The dismissal was affirmed by the Eleventh Circuit and a request for rehearing was denied.

Petitioners, in their "Statement of the Case" say that the "only issue" is whether this case should be tried on its merits under the Florida rules of *forum non conveniens* or dismissed by application of the federal doctrine of *forum non conveniens.* The Respondents vigorously deny that this case would be tried on its merits by the Florida state courts. Respondents also vigorously dispute that the Florida doctrine of *forum non conveniens* would be applied to this case by a Florida court. This argument is set forth in more detail, *infra.*

ARGUMENT — REASONS FOR DENYING THE WRIT

I.

THERE IS NO IMPORTANT FEDERAL QUESTION OF LAW PRESENT

The issue in this case is narrow and unique to its facts. No amount of rhetoric can convert it to warranting review on certiorari. There is no important question of federal law present. The Petitioners' argument to the contrary is based upon an erroneous premise.

Petitioners assert that an important federal question is present because the Supreme Court has previously recognized a significant *Erie* question when federal and state rules of *forum non conveniens* diverge. Petitioners cite a footnote from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n. 13 (1981) for this proposition. Petitioners then argue here, under *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) the Florida rules of *forum non conveniens* would preclude dismissal of this case. Thus, Petitioners contend that there is a significant *Erie* question involving constitutional notions of federalism because, they assert, the "accident of diversity" determines the outcome of this case.[1] Thus, Petitioners argue that there is a significant *Erie* — therefore federal — question presented here.

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[1]It is true, apparently, the only state where the doctrine of *forum non conveniens* arguably might differ from the federal jurisprudence pertaining to that doctrine is the State of Florida. *See, e.g., Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 155 n. 10 (2d Cir. 1980).

Petitioners' argument contains a crucial and fatal flaw. Its primary premise is incorrect. The Florida rules of *forum non conveniens*, which Petitioners claim would preclude dismissal, would not even apply in this case even if it were tried in the Florida state courts. If the District Court were to apply Florida law in this case—which it certainly must do with respect to substantive law—it would be bound to apply the entirety of Florida's law. This would necessarily include the application of Florida's rules pertaining to conflicts, or choice of substantive law. *See Klaxton v. Stentor Electric Co., Inc.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). *See also* the many cases cited at Wright, Miller & Cooper, 19 *Federal Practice & Procedure*, §4506 at 73 n. 37 (1981). Thus, the Federal District Court in the Southern District of Florida applying Florida's substantive law would be bound to apply the Florida rules pertaining to choice of substantive law. Contrary to the implication in the Petition, Florida courts would choose to apply the substantive law of the jurisdiction with the most significant contacts, which would be Costa Rica. *See Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980); *Restatement of Conflict of Laws* (2d) §§ 145-146 (1971).[2]

It is quite clear that Florida law would require application of the substantive law of Costa Rica. The only way a Florida court would apply its own rules pertaining to *forum non conveniens*, on the present

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[2]*Restatement of Conflict of Laws* (2d) §146 (1971) provides that, "[i]n an action for personal injury the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship. . . ." *Id.*

facts, would be if *forum non conveniens* were a procedural concept. Here, Petitioners are vigorously disputing that *forum non conveniens* is procedural. It is Petitioners who assert that *forum non conveniens* is a substantive concept. Thus, it is clear that the Florida courts would never apply the Florida law of *forum non conveniens* to this case. Accordingly, the very heart of Petitioners' argument—that Florida rules of *forum non conveniens* would apply to this case and would preclude dismissal—is destroyed. It is, thus, evident that the Petition lacks merit and should be denied.[3]

Further, Petitioners again assert, that the "accident of diversity" interferes with what they call the opportunity of the Florida courts to resolve this matter which the Petitioners amazingly call a matter with which Florida has a fundamental interest. In fact, nothing can be more incorrect. Florida has absolutely no contact with, nor interest in, this lawsuit. This was correctly observed by both the District Court and the Eleventh Circuit. This entire litigation has nothing to do with the State of Florida and it is quite unfair to burden the courts and the citizens of this state with this litigation. Neither Shell nor Dow are Florida corporations and neither Shell nor Dow have their principal place of business in Florida. Moreover, the Petitioners themselves are foreign citizens and they have no true interest in litigating in

[3]A Florida court applying Costa Rican rules pertaining to *forum non conveniens* would dismiss this case. Jurisdiction of Costa Rican courts is strictly territorial. *See Civil Code of Costa Rica*, Articles 6 and 1045-1048; *Labor Code of Costa Rica*, Articles 210-212; *Code of Civil Procedure of Costa Rica*, Articles 1-7. Thus, if the tort took place elsewhere, jurisdiction would not be entertained. It is, therefore, clear that such a hypothetical Florida court applying Costa Rican law would similarly dismiss this case.

the State of Florida other than, perhaps, the fact that Dade County, Florida is traditionally recognized as a high verdict area. It has consistently been held that a plaintiff's choice of forum is not entitled to much deference when the plaintiffs are from a foreign country. *Reyno, supra*, 454 U.S. at 255.

Moreover, giving the Petitioners the benefit of doubt, and assuming, *arguendo*, that the Florida law of *forum non conveniens* would apply to the case if tried in the Florida state courts, the result would not be any different. That is, *Houston v. Caldwell, supra*, would not preclude dismissal here. *Houston v. Caldwell* involved a plaintiff who was resident of West Palm Beach, Florida. With respect to such a suit by a Florida citizen, the court observed that, naturally, there was a "fundamental interest in resolving controversies involving [Florida] citizens." 359 So.2d at 861. Such a "plaintiff's choice of venue is usually favored if the election is one which has been properly exercised under the applicable [venue] statutes." *Id.* at 860.

Additionally, the decision in *Southern Railway Co. v. McCubbins*, 196 So.2d 512 (Fla. 3d DCA 1967) is directly on point and mandates dismissal, under the Florida doctrine of *forum non conveniens*, where the plaintiff was not a Florida resident; the tort occurred outside Florida; and the defendant was not incorporated in Florida and did not have its principal place of business in Florida, but the defendant *did* have an office and agent in Dade County, Florida *and* it conducted business in the State of Florida. In *McCubbins* the Florida doctrine of *forum non conveniens* mandated dismissal. It can readily be seen that *McCubbins* is much more closely on point than *Houston v. Caldwell*. Therefore, even

assuming, *arguendo*, that the Florida doctrine would apply, it would require dismissal. Accordingly, the result would be the same as under the federal doctrine.

For the above reasons it is apparent that the Petitioners' argument is defective. That argument is premised upon the assumption that under Florida rules of *forum non conveniens* the Petitioners would proceed to judgment. However, as indicated above, this premise is incorrect because (a) Florida law of *forum non conveniens* would not even apply; and (b) assuming, *arguendo*, that it did, the Florida law of *forum non conveniens* would mandate dismissal just as is the case under the federal doctrine. Thus, there is no significant *Erie* question present. Accordingly, there is no significant federal question present here.

II.

THIS CASE DOES NOT INVOLVE A FUNDAMENTAL ERROR OF LAW OF EXCEPTIONAL IMPORTANCE.

The Eleventh Circuit was correct in its conclusion and in its analysis. The Eleventh Circuit was following the more substantial weight of authority in finding that the federal rules of *forum non conveniens* apply in this case. There can be no doubt that *forum non conveniens* is a procedural concept for *Erie* purposes. It is a "housekeeping rule" of the federal district courts. In large part the doctrine focuses upon the convenience and the docket *of the court* applying the doctrine. Clearly the concerns addressed by the doctrine would make it "anomalous for [a federal] court to apply anything

but federal principles [of *forum non conveniens*]." *Alexander v. Richardson Merrill, Inc.*, 542 F.Supp. 93, 98 (S.D. N.Y. 1982). Some federal courts have squarely and succinctly held that, for purposes of *Erie*, *forum non conveniens* is a procedural concept. "*Forum non conveniens* is a procedural doctrine that is governed by federal rather than state law even in cases where jurisdiction is granted on diversity of citizenship." *Ciprari v. Cruzerio*, 232 F.Supp. 433, 442 (S.D. N.Y. 1964). *Accord*, *Hodson v. A. H. Robbins Co.*, 528 F.Supp. 809 (E.D. Va. 1981); *Poe v. Marquette Cement Mfg. Co.*, 376 F.Supp. 1054, 1060 (D. Md. 1974); *Alexander v. Richardson Merrill, Inc.*, *supra*.

Forum non conveniens, as recognized by the Petitioners, is an incidence of venue. "Venue is an incidence of procedure." *Hadlich v. American Mail Line*, 82 F.Supp. 562, 563 (N.D. Cal. 1949). The doctrine pertains to the "public interest factors" associated with the federal courts themselves. It has nothing to do with private rights created by state substantive bodies of law. Professor Moore also recognized that *forum non conveniens* is procedural in the *Erie* context. Moore states that,

> this doctrine is but a facet of venue. Because of that, because the doctrine affects the trial convenience of the federal court and their dockets and because of the mobility of the federal judiciary on a national scale, *they should be independent of state doctrines of forum non conveniens*, fashioned for courts operating on a state scale. *Forum non conveniens* is procedural and the new code so treats it. *Erie R. Co. v. Tompkins* does *not* require conformity

> by the federal courts to the practice of the states in this matter.

Moore, 1A *Fed. Prac. and Pro.* §0.317(2) at 3232-33 (1981) (emphasis added).

Petitioners' argument is based upon what they perceive to be an inadequate *Hanna v. Plumer* "outcome-determinative" analysis by the Eleventh Circuit. However, this court recognized in *Hanna* itself that the " 'outcome-determination' analysis was never intended to serve as a talisman." *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965). More importantly, *Hanna* only controls where a *federal rule* directly conflicts with state law. This was recognized in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). *Walker* dealt with Federal Rule 3 which pertains to when an action is "commenced." The court found that Rule 3 did not conflict with state law on the subject. Thus, the court held "[s]ince there is no direct conflict between the federal rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752. Instead, the case was controlled by *Erie* and *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530 (1949).

Accordingly, the Petitioners' argument that the Eleventh Circuit committed a fundamental error of law is incorrect. First, the Eleventh Circuit was quite correct in holding that *forum non conveniens* is not a substantive concept for purposes of *Erie*. Thus, the Eleventh Circuit was correct in applying the federal rules pertaining to that doctrine. Secondly, the Petitioners' argument in this respect is premised upon what they perceive was an inadequate "outcome-determinative" analysis which, Petitioners claim, was mandated by *Hanna v. Plumer*. However, *Hanna* only controls when

a case presents a direct conflict between a federal rule of civil procedure and a state law on the same topic. Such is not the case here.

Indeed, it is anomalous for a federal court to be constrained by state rules pertaining to *forum non conveniens* since it is a doctrine affecting the court itself. It is illogical that federal district courts, operating on a national scale, should be bound to apply the various state jurisprudence pertaining to state doctrines of *forum non conveniens*. Thus, logic, Professor Moore and various federal court decisions are cited in support of Respondents' contention that the federal rules of *forum non conveniens* apply to this case. On the other hand, Petitioners cite nothing directly in support of their illogical contention. Rather, their argument is convoluted and is based in large part upon a decision—*Hanna*—which is inapposite with respect to the present facts.

CONCLUSION

For the above reasons the petition should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition was mailed this 15th day of October, 1985, to: JANE N. SAGINAW, ESQ. and RUSSELL W. BUDD, ESQ., Baron & Budd, 8333 Douglas Avenue, 10th Floor, Dallas, Texas 75225 and HENRY BURNETT, ESQ., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; BURT BALLANFANT, ESQ., Shell Oil Co., Litigation Section, 900 Louisiana, Room 4794, Houston, Texas 77001.

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By /s/ Leanne Frank Pflaum
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Appendix

NON-FULLY OWNED SUBSIDIARIES AND AFFILIATES OF THE DOW CHEMICAL COMPANY AS OF SEPTEMBER 30, 1985

Subisidaries and affiliates owned both directly and indirectly have been included. The company underlined is the direct owner of the companies listed below it. "Dow's" percent ownership is indicated by each company.

SUBSIDIARIES

THE DOW CHEMICAL COMPANY

Alamo Land Company, Inc. (56%)
Gruppo Lepetit S.p.A. (99%)
L.I.F.E. (Laboratorios Industriales Farmaceuticos Ecuatorianos (59%)
Laboratorios L.I.F.E. del Salvador S.A. (59%)
Negocios e Industrias S.A. "Neisa" (59%)
Pacific Chemical Berhad (51%)
Pacific Cable Products Sendirian Berhad (26%)
Ivon Watkins-Dow, Ltd. (51%)
Societe Industrielle de Plastic el de L'acier S.A. (99%)
The Cynara Company (90%)

DOW CHEMICAL A.G. (A.G. owned 100% by The Dow Chemical Company)

Petroquimica-Dow S.A. (70%)

AFFILIATES

THE DOW CHEMICAL COMPANY

Dow Corning Corporation (50%)
Dowell Schlumberger Corporation (50%)
Dowell Schlumberger Incorporated (50%)
Compagnie des Services Dowell Schlumberger (50%)
El Dorado Terminals Company (50%)
Agro-Quimica Maringa (20%)
Bank Mendes Gans (29%)
Chemi-Trol Chemical Company (23%)
DOKI (49%)
Estireno Del Zulia C.A. (25%)
Ibachem, Ltd. (40%)
Oasis Pipeline Company (30%)
Package Machinery Company (29%)
Total Raffinaderij Nederland N.V. (20%)
Zoo Agro de Venezuela C.A. (49%)
Al Miyah Chemicals (Ltd.) (49%)
Baratek (80%)
Boersele Hydrocracker B.V. (45%)
Insul/Crete Company, Inc. (50%)
Joliet Trust Company (50%)
Long Beach Trust Company (50%)
Metal Mark, Inc. (50%)
Oronzio De Nora Impianti Elettrochemici S.A. (50%)
Sinor Corradini Navarra S.A. (90%)
Technovest Corp. (20%)

DOW CHEMICAL, A.G. (A.G. is owned 100% by The Dow Chemical Company)

Polychem, Ltd. (25%)

CORAL NAVIGATION (Coral is owned 100% by The Dow Chemical Company)

Chief Shipping Company (50%)

DOW CHEMICAL COMPANY, LTD. (Ltd. is owned 100% by Dow Chemical A.G.)

Cromarty Petroleum Company, Ltd. (50%)

DOW CHEMICAL CANADA, INC. (Canada, Inc. is 100% owned by The Dow Chemical Company)

Schlumberger Canada, Inc. (50%)
Fort Saskatchewan Ethylene Storage Limited (50%)
Lawrason's Chemical, Ltd. (20%)
Wabiskaw Explorations Limited (50%)

MALIGNE RESOURCES LIMITED (Maligne is 100% owned by Dow Chemical Canada, Inc.)

MT Partnership (50%)

DOW CHEMICAL AFRICA (PTY) LIMITED (Africa is 100% owned by Dow Chemical A.G.)

J.V. Chemicals (50%)

DOW CHEMICAL INTERNATIONAL ENERGY COMPANY (Energy is 100% owned by The Dow Chemical Company)

Scotdril Offshore Co. (50%)

DOW CHEMICAL S.p.A. (S.p.A. is 100% owned by Dow Chemical A.G.)

Corradini Poliuretani S.p.A. (100%)

DOW CHEMICAL IBERICA S.A. (Iberica is 100% owned by Dow Chemical A.G.)

Transformadora De Etileno (50%)

Dow Quimica S.A. (Quimica is 100% owned by The Dow Chemical Company)

Estireno del Zulia C.A. (25%)
Expanso Correctora De Seguros Ltda (33%)

DOFINCO, INC. (Dofinco is 100% owned by The Dow Chemical Company)

DCS Capital Partnership (50%)
DCS Capital Corporation (100%)

DOW FINANCIAL SERVICES CORPORATION (Financial Services is owned 100% by The Dow Chemical Company)

Dow Banking Corporation (82%)
Dow Scandia Holdings Limited (52%)
Dow MBF Limited (57%)
MBF Factors SDN. BHD. (26%)
MBF Leasing BHD. SDN. (10%)
MBF LEASING (S) Pte. Ltd. (49%)